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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 506

JACOB B. ZIMMERMAN, et al.,
Petitioners,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the United States:

Now come Jacob B. Zimmerman, et al., plaintiffs-appellees below, by their duly authorized attorneys, and pray that a writ of certiorari issue to review two judgments entered by the United States Court of Appeals for the Seventh Circuit on November 16, 1950 (R. 167-168), rehearing denied December 7, 1950 (R. 181).

In support of this petition, your petitioners respectfully show:

Opinions Below.

The District Court did not prepare or file an opinion. Its findings of fact and conclusions of law are set forth in the record (R. 113-119, 141-149). The opinion of the Court of Appeals is reported in 185 F. (2d) ..... (R. 165-166).

Jurisdiction.

The judgments of the Court of Appeals were entered on November 16, 1950. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented.

1. Whether in class actions under Rule 23(a) of the Federal Rules of Civil Procedure, a district court has the power to enter interlocutory orders maintaining the status quo upon a provisional determination of the class facts pertinent under the Rule, or whether, as the Court of Appeals held, a district court is without power to grant such interlocutory relief because it is unable to determine the class facts under the Rule "until after production of evidence upon the merits" and after "determination of the merits."

2. Whether an action by preferred shareholders on behalf of themselves and the preferred shareholders as a class to compel the declaration of a dividend is a true class action under Rule 23(a).

3. If the answer to Question 2 is in the negative, whether plaintiffs may nevertheless be reimbursed for attorneys' fees and expenses out of dividends declared as a result of their efforts.

4. Whether a corporation which had irrevocably declared and was about to pay a dividend to its preferred shareholders has standing to appeal from an order temporarily impounding a portion of that dividend.

Rule Involved.

Rule 23(a) of the Federal Rules of Civil Procedure provides:

> "(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action, or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Summary Statement of Matters Involved.

The petitioners (plaintiffs-appellees below) filed a complaint to compel the defendant railroad corporation to declare preferred dividends which, it is charged, had been fraudulently or wrongfully withheld due to the acts of a group of common shareholders who controlled and dominated the defendant's board of directors. (R. 2-18) The complaint sets out in circumstantial detail the steps taken at the instance of the controlling common stock group in connection with its program, including the promulgation

and espousal of a plan for the elimination of the preferred stock. The plaintiffs opposed the plan before the Interstate Commerce Commission, and it was subsequently withdrawn by the defendant after a Commission examiner on two occasions had recommended its rejection and had characterized it as designed primarily to avoid the payment of preferred dividends. (R. 2-18, 39, 68, 26-27) Immediately after the plan's withdrawal and the denial of a motion to dismiss the complaint, the defendant railroad corporation, for the first time in a number of years, declared dividends that were within the reach of the plaintiffs' prayer for relief. (R. 36, 118)

The District Court found that there were reasonable grounds to believe that the dividends had been declared as a result of the plaintiffs' efforts and that they were about to be paid to 2800 scattered shareholders. (R. 118) Accordingly, it temporarily impounded a portion of those dividends pending final determination of the plaintiffs' cause of action, and pending final determination of whether the plaintiffs were entitled to reimbursement, from such dividends, for attorneys' fees and expenses incurred in producing them. (R. 119-120) The Court of Appeals reversed upon the ground that such an interlocutory impounding order was "wholly premature and unsupported in law" because the District Court could not determine whether this was a true class action and whether the plaintiffs were proper class representatives "until after production of evidence upon the merits" and "prior to determination of the merits" (R. 166).

The Court of Appeals did not question the trial court's underlying findings of fact. The relevant findings may be briefly summarized as follows:

1. Irreparable injury would result if the status quo were not maintained by impounding a portion of the divi-

dends. For if the dividends already declared but not yet disbursed by the defendant corporation were paid in full to the 2800 scattered preferred shareholders, no subsequent showing on the merits could recapture any part of the dividends, or provide payment for the services that produced them (R. 118, 40, 74).[1]

2. The plaintiffs had provisionally established the class facts required by Rule 23(a). There was a large and scattered group of preferred shareholders (R. 118, 74). The plaintiffs had substantial interests as preferred shareholders (R. 114, 45). They were asserting a right common to all preferred shareholders to compel the declaration to the entire class of dividends fraudulently or wrongfully withheld (R. 114, 2-18). They had advised all of the preferred shareholders of the contents of the complaint, had received financial support from over 100 other members of the class, and had met the opposition of none (R. 114, 34, 50-51). A single large preferred shareholder who had intervened in the trial court in opposition to the impounding order did not oppose the merits of the plaintiffs' action (R. 85, 100). Indeed, plaintiffs' representative character had been only formally denied; defendant did not challenge or even respond to the factual averments in plaintiffs' affidavits on the representation issue (R. 114, 34, 50-51).

[1] The only portion of the Court of Appeal's opinion that might be construed as touching on the question of irreparable injury was its reference to the absence of a "claim that defendant Railway Company is insolvent" (R. 166). The solvency or insolvency of the defendant railroad is plainly irrelevant. The plaintiffs' claim for attorneys' fees and expenses is not and can not be against the defendant railroad and can not be collected from its general assets. The railroad, and hence its common shareholders, can not be ordered to compensate the plaintiffs' attorneys for their efforts in producing preferred dividends. Only the preferred shareholders who received those dividends were benefited; only those who benefited were liable.

3. Plaintiffs' counsel had rendered extensive services prior to the application for interlocutory relief. Indeed, the plaintiffs' representation of the entire class had been so vigorous as to lead the District Court to find that there were reasonable grounds for believing that it was their efforts that had produced the dividends for the class they represented (R. 118, 39-40, 44-45).

Upon these findings the impounding order of March 30, 1950 was entered. (R. 120-1)

After the entry of this impounding order, the petitioners' action was consolidated in the trial court with an action brought by another preferred shareholder seeking the same relief, and upon the declaration of a subsequent dividend a similar impounding order for the protection of both sets of plaintiffs was entered in the consolidated cause (R. 149-150).

The defendant corporation, but not the intervening preferred shareholder, appealed from the entry of both orders (R. 121, 151). Since both appeals involved substantially identical questions, it was stipulated that they should be heard in the Court of Appeals on the record made in connection with the first order (R. 160-161).[2] Plaintiffs' motion to dismiss the appeal from the first order for the reason that the defendant railroad was not aggrieved, and hence was without standing to appeal, was denied simultaneously with the entry of the judgments reversing

[2] It is for this reason that the record before this Court and this petition primarily reflect the facts with respect to the first order. Such portions of the proceedings on the second order as seem necessary to show jurisdictional facts have also been preserved in the record before this Court (R. 139 et seq.). The disposition to be made of the first order will control the second.

the orders below (R. 169). By stipulation the motion to dismiss had been made applicable to both appeals (R. 160-161).

Reasons for Granting the Writ.

I.

The decision below sharply curtails or eliminates altogether the power of the district courts to grant interlocutory relief to maintain the status quo in class actions under Rule 23(a). This presents a question of major importance and is in conflict with this Court's prior decisions in class actions.

In reversing the District Court's order, the Court of Appeals held that the interlocutory order entered by the District Court was "unsupported in law" "prior to determination of the merits" because whether this was a true class action and whether the plaintiffs were proper class representatives (class facts pertinent under Rule 23(a)), "can not be determined until after production of evidence upon the merits". In so holding, the Court of Appeals not only has established a standard for the granting of interlocutory relief in class actions wholly different from that prevailing in all other actions, but has probably precluded a district court from ever granting interlocutory relief in such cases.

For the District Court did all that can ever be done before granting interlocutory relief. It received affidavits, heard extensive argument, and, on the basis thereof, entered detailed findings of fact. These findings, unquestioned by the Court of Appeals, provisionally established all of the facts, including the "class facts" under Rule 23(a), which, if finally established, gave the plaintiffs right to reimbursement out of the benefits produced for the preferred shareholders as a class. *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939); *State Life Insurance*

Co. v. *Board of Education,* 401 Ill. 252 (1948) (following and relying upon *Ticonic*); *Winton* v. *Amos,* 255 U. S. 373, 392-394 (1921); *Trustees* v. *Greenough,* 105 U. S. 527 (1881). And, unless the status quo were preserved until final adjudication, the plaintiffs would be irreparably injured.

Rule 23(a) makes it possible for some to sue on behalf of all of the members of a class. It was intended to preserve a procedural device necessary for the assertion of the rights and obligations of widely dispersed groups in an industrial society, while at the same time imposing safeguards against demonstrated abuses. Thus, the Rule imposes restrictions on the persons by whom, and the circumstances under which such suits may be brought. But the Rule does not circumscribe, nor impose special conditions precedent upon, the granting of ordinary equitable remedies by the district courts. Nothing in Rule 23 requires that the "class facts" set out in the Rule must be established with greater finality to obtain interlocutory relief than any other facts prerequisite to the granting of such relief. All such facts may be established and found provisionally, and, indeed, *must* be established and found provisionally, if the chancellor is not to be stripped in this one type of action of powers indispensable to his doing equity. *Ohio Oil Co.* v. *Conway,* 279 U. S. 813 (1929); *Nestor Johnson Mfg. Co.* v. *Goldblatt,* 371 Ill. 570, 574 (1939). The holding of the Court of Appeals to the contrary is in conflict with prior decisions of this Court.

In *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282 (1940), a class action, this Court had to determine whether a district court had the power to proceed in equity, under the Securities Act of 1933, at the instance of private per-

sons suing on behalf of a class.[3] Having determined that equitable powers did exist, this Court stated as a matter of course that the district court had the power to "preserve the status quo *pending final determination* of the questions raised by the bill." This Court also pointed out that the discretion of the chancellor in issuing such an injunction would not lightly be disturbed. (311 U. S. at 290)[4] *Gibbs* v. *Buck*, 307 U. S. 66 (1939) was characterized by this Court as a true class action. (307 U. S. at 74) And a preliminary injunction in favor of the class represented by the plaintiffs was sustained on a showing by affidavit as to the plaintiffs' representative character; that plaintiffs had a substantial claim; and that a failure to issue the injunction would result in irreparable injury.

Another illustration of the conflict between the decision below and the rule heretofore applied in this Court appears in the equity receivership cases. An equity receivership is of course a form of relief purely interlocutory in nature. *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491, 497 (1923); *Gordon* v. *Washington*, 295 U. S. 30, 37 (1935). Such receiverships were regularly sought in class actions instituted by one or more creditors on behalf of themselves and other creditors and members of the creditor class thus represented were thereupon regularly enjoined from suing the defendant corporation. See *e. g. Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 486-488 (1933); *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530 (1890).

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[3] The class nature of the action fully appears from the lower court's decision. Independence Shares Corp. v. Deckert, 108 F. (2d) 51, 55 (C.A. 3rd, 1939).

[4] The Court of Appeals held that the District Court was without power as a matter of law to enter such an interlocutory order. It did not review the District Court's exercise of discretion, assuming that such a discretion was within the bounds of its power.

The rule established by the Court of Appeals requires the denial of interlocutory relief in the absence of *final* proof of facts under Rule 23(a) which relate exclusively to capacity to sue, although so stringent a rule is not invoked even where one of the questions to be considered in granting interlocutory relief is whether the court has jurisdiction to act at all. *United States* v. *United Mine Workers,* 330 U.S. 258, 290-293 (1947); *United States* v. *Shipp,* 203 U. S. 563, 573 (1906).

It is manifestly a question of first importance whether, as the Court of Appeals expressly held, the class facts required by Rule 23(a) can not be established provisionally for purposes of interlocutory relief, but can be established only after the production of evidence upon, and a determination of, the merits. For it can not be said too often that if this be so, the district courts can never grant interlocutory relief in class actions. If the holding of the Court of Appeals is correct, it materially restricts the usefulness of an ancient procedural device which from the earliest days this Court has thought indispensable "to prevent a failure of justice". *Smith* v. *Swormstedt,* 16 How. 288, 303 (1853). Although a proceeding to compel the declaration of dividends is a direct proceeding against the corporation and not a derivative one in its behalf, this Court has pointed out in language applicable to either that the class action is a

> "remedy, born of stockholder helplessness [it] was long the chief regulator of corporate management and has afforded no small incentive to avoid at least grosser forms of betrayal of stockholders' interests. It is argued, and not without reason, that without it there would be little practical check on such abuses." *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U.S. 541, 548 (1949).

Similarly the courts of appeals have emphasized the usefulness of class actions and have taken great pains that their effectiveness should not be "nibbled away". *Montgomery Ward & Co.* v. *Langer,* 168 F. (2d) 182, 187 (C.A. 8th, 1948); *System Federation No. 91* v. *Reed,* 180 F. (2d) 991, 997 (C.A. 6th, 1950).

Although in *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541 (1949), this Court accepted material statutory restrictions upon the effectiveness of a derivative class action, those limitations were imposed by the state legislature, the final arbiter of the availability of the state courts. But neither the Illinois legislature or courts, nor this Court in its rule making capacity, have ever imposed restrictions of the type imposed by the Court of Appeals.

The question is no parochial one limited to the protection of attorneys' fees. Thus, under the holding of the Court of Appeals, interlocutory relief, including the maintenance of the status quo, can not be granted in actions by, against, and within unincorporated associations where either plaintiffs or defendants appear in a representative capacity; in suits by one or more of a class of beneficiaries against the trustee, or to preserve the trust property; in suits by individuals on behalf of groups asserting discrimination against those groups; in all non-derivative class actions, such as the present one, by shareholders against their corporations; and in all derivative actions by shareholders on behalf of their corporation against third persons. These and other types of class actions are governed by Rule 23(a), and hence within the scope of the special limitations imposed by the Court of Appeals in this case.

This Court should plainly decide whether in all such cases the power of the district courts to maintain the status qquo in class actions is materially impaired or restricted by Rule 23(a) or any other federal equitable doctrine, and whether this Court's prior decisions rest upon an improper assumption as to the availability of interlocutory relief in class actions.

Although this Court is reluctant generally to review interlocutory decisions, the decision of the court below is not one to which that reluctance should apply. For although interlocutory in form, the judgments of the Court of Appeals, if they stand, operate as a final adjudication.

The trial court found as a fact that there were reasonable grounds for believing that the declaration of the dividends here involved was due to the plaintiffs' action, and by its impounding order maintained the *status quo* until a final determination could be made. But reimbursement can be had only from the dividends produced. Unless a portion is preserved pending determination of the right to reimbursement, the dividends will be beyond the reach of the District Court for they will have been distributed to 2800 scattered preferred shareholders. If the judgments of the Court of Appeals stand, the impounded dividends will be disbursed and the prosecution of plaintiffs' claim to reimbursement for having produced them will be wholly fruitless.[5] Their claim will have become moot, and there will be no opportunity for a review of the orders after the whole case on the merits has been finally decided. *Cf. Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U. S. 541, 545-546 (1949). For the same reasons, review of the judgments of the Courts of Appeals

[5] The Court of Appeals has stayed its mandate (R. 184) so that if it committed error, it remains within the power of this Court to correct it.

is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case." *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, 384 (1893); *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945); *Land* v. *Dollar*, 330 U. S. 731, 734, fn. 2 (1947).

II.

The decision of the Court of Appeals is in direct conflict with Sprague v. Ticonic National Bank, 307 U. S. 161 (1939), or State Life Insurance Co. v. Board of Education, 401 Ill. 252 (1948), whichever controls.

Critical to the conclusion of the Court of Appeals that the trial court's impounding order was premature, was its express holding that plaintiffs' right to reimbursement depended upon whether the trial court finds that the plaintiffs "represent a class in such manner and to such extent as to make of this a true class action." (R. 166) For the court below reasoned that unless plaintiffs' action was finally shown to be a true class action, benefits resulting to the preferred shareholders from the efforts of the plaintiffs and their attorneys would give rise to no right of compensation.[6] In addition, the Court of Appeals stated that "there is no fund in court except by virtue of an order impounding certain of the company's moneys owed by it to the preferred stockholders" (R. 166). The only possible implication is that this, too, precluded the granting of interlocutory relief.

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[6] The court assumed, therefore, that interlocutory relief could not be given because the right to reimbursement, which plaintiffs sought to protect, might never be established. This, too, is error. That the temporarily protected party might not prevail after hearing upon the merits, is no bar to interlocutory relief. Ohio Oil Company v. Conway, 279 U. S. 813, 814-815 (1929); Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570, 574 (1939).

This holding is directly contrary to the law as declared by this Court and as declared by the Supreme Court of Illinois. *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939) expressly held that the power "of federal courts in equity suits to allow counsel fees and other expenses" of litigation was *not* confined to true class actions, nor even to representative actions. Nor was it confined to cases in which a fund was formally brought into court. This Court determined that the allowance of plaintiffs' expenses and counsel fees against a group of persons benefited by the plaintiffs was a "part of the historic equity jurisdiction of the federal courts" unconfined by the form in which the action securing the benefits was cast. (307 U. S. at 164, 166) *Cf. Winton* v. *Amos*, 255 U. S. 373, 392-394 (1921). The language of *Ticonic* makes the matter one in which federal law controls, and its holding is squarely in conflict with the holding of the court below.

But whether state or federal law controls, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), is of no importance to the present case. *State Life Insurance Co.* v. *Board of Education*, 401 Ill. 252, 258 (1948) expressly adopts the rule of *Ticonic* both in holding and in theory. In that case, the plaintiffs brought a non-representative action to determine their share, as one group of warrant holders, of funds collected and to be collected for the payment of Board of Education tax warrants. A fee application was made by the successful plaintiffs to be charged against all of the competing groups of warrant holders, upon the theory that by establishing the appropriate rule of distribution they had con-

ferred benefits upon all of such holders. Expressly relying upon the *Ticonic* case, the Supreme Court of Illinois held that it was proper to grant the application, and expressly rejected objections thereto based on the fact that plaintiffs had not sued in a representative capacity.

In holding that the trial court may award fees and allowances to plaintiffs' attorneys only if it finds that the plaintiffs "represent a class in such manner and to such extent as to make of this a true class action", the Court of Appeals has reached a conclusion directly in conflict with the *Ticonic* case decided by this Court, and the *State Life Insurance* case decided by the Supreme Court of Illinois. Such a conflict presents a plain case for granting the writ.

III.

Whether the proceeding below is a true class action is a question of law determinable at the outset of the litigation. The contrary holding of the Court of Appeals is in direct conflict with applicable decisions of this Court.

A subsidiary holding basic to the judgment of the Court of Appeals is that "whether this is a true class action has not yet been and can not be determined until after production of evidence upon the merits" (R. 166). In so holding, the court seems to have confused two distinct problems: one, whether a true class action exists, and the other, the question of whether the plaintiffs are qualified to act as representatives of the class. Compare Rule 23(a)(1) with Rule 23(a). The latter is susceptible of a determination upon evidence; the adequacy of plaintiffs' provisional showing on this point has already been shown *Supra* p. 5. But whether their action is a true class action is a pure question of law. And if it is essential to the plaintiffs' ultimate recovery of reimbursement that this

action be a true class action, the pleadings settle that question as a matter of law under the applicable decisions of this Court. *Hartford Life Insurance Company* v. *Ibs*, 237 U. S. 662 (1915); *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356 (1921); *Smith* v. *Swormstedt*, 16 How. 288 (1853). For nothing remains to be shown on the merits with respect to the nature of the action. We are unable even to speculate as to the kind of proof that could affect the determination of this issue.

Rule 23(a)(1) states the ingredients of a true class action. *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, 405 (C.A. 4th, 1945); *System Federation No. 91* v. *Reed*, 180 F. (2d) 991, 995-996 (C.A. 6th, 1950). Under the Rule, such an action is one brought by one or more persons as the proper representatives of a numerous class "where the character of the right sought to be enforced for * * * the class is * * * common."

No extended argument is required to demonstrate that the rights which the plaintiffs' action is brought to vindicate are rights common to all of the preferred shareholders as a class. Plaintiffs' suit is an action on behalf of all preferred shareholders as a class to compel the declaration of dividends. The ultimate right to be vindicated finds its common origin in the articles of incorporation and the statutory law of the State of Illinois. All of the questions involved in obtaining the relief sought are common to all of the preferred shareholders and peculiar to none. Among the rights asserted is the common right to have the board of directors exercise a free, independent and honest discretion as to whether or not dividends should be declared, the common right to be protected from the abuse of that discretion, or from its im-

proper delegation to controlling or specially interested shareholders, and the common right to have the intervention and protection of a court of equity to determine the existence of fraud or an abuse of discretion, and upon a proper showing to direct the declaration of dividends. Not merely are the rights common to the class, but any relief that may be granted by a court of equity can accrue only to the class as such, and not to any particular shareholder.[7]

The decision of the Court of Appeals that the trial court was unable to determine that this was a true class action until the production of evidence on the merits (R. 166) is in plain conflict with the three decisions of this Court cited above, and the requirements of Rule 23(a). Indeed, in *Hartford Life Insurance Co.* v. *Ibs,* 237 U. S. 662 (1915), the Court, to support its holding that a true class action was involved in that case, relied upon the analogy between the certificate holders' action there, and suit by shareholders against their corporation. (237 U. S. at 671). Accord: Restatement of Judgments, §86, comment e.[8]

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[7] Sharp distinction must be drawn between a suit to compel the declaration of dividends, which involves only rights common to the entire class, and a suit against the corporation to collect a dividend already declared, which is simply an action at law to recover a personal debt.

[8] Although district courts in different circuits have taken opposed positions on the question of whether such a suit as this is a true class action, neither had any difficulty in reaching a result in advance of a hearing on the merits, so that both decisions are contrary to that of the Court of Appeals. Contrast Williams v. Green Bay and Western Railroad Co., 68 F. Supp. 509 (S.D. N.Y. 1946), with Giesecke v. Denver Tramway Corporation, 81 F. Supp. 957, 961-963 (D. Del. 1949).

IV.

The Court of Appeals was without jurisdiction to consider the defendant corporation's appeal.

Only the defendant railroad corporation appealed from the impounding orders entered by the district court (R. 121, 151). No appeal was taken by the holder and representative of a large number of preferred shares who had been permitted to intervene in the trial court and had opposed the orders. (R. 112, 109). The plaintiffs moved to dismiss the appeal from the March impounding order upon the grounds that the railroad was without standing (R. 158).[9]

Simultaneously with the entry of its judgment and without opinion, the Court of Appeals denied the motion to dismiss. (R. 169).

This Court has always used the writ of certiorari to correct the wrongful assumption of power by the federal courts. This case calls for the granting of the writ by this Court to correct the exercise by the Court of Appeals of a jurisdiction it does not have.

It is hornbook law that an appeal must be dismissed unless the appellant is aggrieved by the order appealed from. This means that the appellant must have an interest in the result which is direct, immediate, pecuniary and substantial. *Farmers' Loan and Trust Co.* v. *Waterman*, 106 U. S. 265 (1882); *King* v. *Buttolph*, 30 F. (2d) 769 (C.A. 9th, 1929); *In re Michigan Ohio Building Corp.*, 117 F. (2d) 191 (C.A. 7th, 1941); 3 Moore's Federal Practice (1st ed. 1938) Section 73.02. See *Bosworth* v. *St.*

[9] By stipulation, the appeals from the two impounding orders were consolidated and the motion to dismiss made applicable to both (R. 160-161).

Louis Terminal Association, 174 U. S. 182, 187 (1899). The defendant corporation here had no such interest in the impounding order.

The dividend in question had been declared by the corporation (R. 59). It then became a debt to the preferred shareholders. *Cratty* v. *Peoria Law Library Association,* 219 Ill. 516, 522 (1906). The impounding order operated only to affect the persons to whom that admitted debt was about to be paid. The question presented by the impounding order was: Should the debt be paid directly to the preferred shareholders, or should the trial court hold a portion of it temporarily while it was determining whether that portion should be paid to the preferred shareholders ratably, or whether some of it should be awarded to the plaintiffs for services rendered in producing it? *Cf. Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, 72-73 (1939); *Basket* v. *Hassell,* 107 U. S. 602, 608 (1882); *Bayard* v. *Lombard,* 9 How. 530, 550 (1849). In that contest the corporation had no appealable interest. See also *Bosworth* v. *St. Louis Terminal Association,* 174 U. S. 182, 187 (1899), which makes clear that where the only contest is over the distribution of a payment, a payor whose liability is fixed lacks an appealable interest.

And the decision below is in conflict with decisions of the lower courts that have refused to allow persons bound to make distribution, but not themselves distributees, to contest distribution orders. Thus, an executor may not appeal from an order distributing an estate in his hands among competing legatees and devisees. *King* v. *Buttolph,* 30 F. (2d) 769 (C.A. 9th, 1929); *Spriggs* v. *Stone,* 174 F. (2d) 671 (App. D.C. 1949). Nor may an insolvent corporation appeal from an order allowing fees from its

assets. *Haight & Freese Co.* v. *Weiss,* 165 Fed. 430 (C.A. 1st, 1908). The present case presents a question identical in principle.

The defendant corporation, therefore, lacked any appealable interest in the interlocutory impounding order. With no interested person before it to assert a justiciable claim, the Court of Appeals was acting without jurisdiction. A writ of certiorari is appropriate to correct the action of the Court of Appeals in exceeding its powers.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 506

JACOB B. ZIMMERMAN, et al.,
Petitioners,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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February 2, 1951.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

This brief is filed on behalf of respondent, Chicago Great Western Railway Company, an Illinois corporation, appellant in the Court of Appeals, and one of the defendants in the District Court. (R. 3, 151, 165.) Counsel for a committee of preferred stockholders which represents 769 of respondent's 2800 preferred stockholders (R. 60) have presented to this Court a motion for leave to file, as *amicus curiae*, a separate brief in opposition to the petition for a writ of certiorari.

Opinion Below.

The opinion of the Court of Appeals is reported in 185 F. 2d 399, *Zimmerman* v. *Chicago Great Western R. Co.*

Statement of the Case.

The opinion of the Court of Appeals relates to impounding orders entered by the District Court on March 30, 1950, and June 21, 1950. (R. 120–1, 149–50, 165–6.) The amount impounded by the two orders is approximately $114,400. (R. 120, 129–30, 149–50.) It was stipulated by the parties that both appeals should be heard on the record made in connection with

the first order. (R. 160–2, Petition 6.) For this reason, the statement of the case and argument in this brief relate to the March 30 order and the record on which it was made.

The appeal from the March 1950 order was taken under 28 U.S.C. Sec. 1292 because the order is, in effect, an interlocutory injunction which (1) mandatorily required respondent to deposit part of a lawfully declared dividend with the clerk of the District Court, and (2) prohibited respondent from distributing the full amount of a lawfully declared dividend.

The suit was brought by petitioners—nine of respondent's 2800 preferred stockholders—in June 1949 to compel a declaration of dividends on respondent's preferred stock. (R. 2, 17, 29.) These nine petitioners together hold 7215 shares, which amount to approximately two percent of the total amount of preferred stock. (R. 23, 29–30, 34–5.) The jurisdiction of the District Court is based on diversity of citizenship. (R. 3, 29.)

Petitioners charge that a group of common stockholders came into control of respondent in 1946, and have used their alleged control to enhance the value of the common stock and depress the value of the preferred stock. The principal steps alleged to have been taken are (1) discontinuance of dividends on the preferred stock after March 1946, (2) use of earnings to make substantial retirements of bonded indebtedness and pay off a loan made by Reconstruction Finance Corporation, (3) unnecessary expenditures for the purchase of diesel locomotives and maintenance of physical properties, and (4) the filing of an application with the Interstate Commerce Commission for authority to offer preferred shareholders income debentures and common stock in exchange for preferred stock. (R. 5–16.)

The answer of respondent denies the allegations of control by the alleged group of common stockholders, and also denies all allegations of a plan or purpose to enhance the value of the common stock at the expense of the preferred stock. (R. 25–8.) During the period complained of (1946–9), the answer states,

net available earnings were not, in the judgment of respondent's directors, sufficient to permit payment of preferred stock dividends because it was necessary, prudent and proper to reduce debt, acquire diesel locomotives, and rehabilitate the physical properties. (R. 27.)

The debt retirement program was undertaken in 1946, and carried forward in 1947 and 1948.* During these three years, more than $10,000,000 in face amount of debt was retired. (R. 10, 24, 27, 115.) The dieselization program was inaugurated in 1948 at an estimated cost of $15,500,000. Expenditures for equipment purchased in 1948 amounted to $2,254,197, and in 1949 to $1,913,490. The balance of the equipment debt was funded by equipment trusts created in 1949. The dieselization program was practically completed by the early part of 1950. (R. 52, 55, 57, 59, 61, 116.) The rehabilitation program was also commenced in 1948. The estimated cost of making up deferred maintenance was $15,000,000, and the program contemplated the expenditure of about $3,000,000 per year in addition to the expense of ordinary maintenance. The total maintenance expense in 1948 was $5,396,361. The rehabilitation program was intensified in 1949, and $7,064,560 was expended for maintenance during that year—an increase of $1,668,199 over 1948. (R. 52, 55, 57, 116.)

The nonpayment of dividends on preferred stock after March 1946 resulted in dissatisfaction among some of the preferred stockholders; and in April 1948 respondent filed with the Interstate Commerce Commission an application for approval of a

* Incidentally, it may be noted that in 1942 the Interstate Commerce Commission had urged railroad companies which had a heavy burden of debt to take advantage of favorable earnings to reduce their fixed charges, and had pointed out that such a program would be in the best interests of the stockholders. The Commission said, *inter alia*, "They [the stockholders] will, we believe, be shortsighted if, by insistence on immediate dividends, they jeopardize the continuance and possible expansion of a program of debt reduction. It is clearly the sane and sound policy to pursue." See *Guttman* v. *Illinois Central R. Co.*, 91 F. Supp. 285, 289–90 (D. C. E. D. N. Y.).

plan whereby any preferred stockholder who wished to do so could exchange preferred stock for income debentures and common stock. (R. 11, 26, 46.) The management did not then foresee an early resumption of payment of dividends on the preferred stock, and wished to offer such preferred stockholders as might be interested a means by which they could get some current interest. (R. 52–3.) The application was never passed upon by the Commission as it was withdrawn in August 1949. (R. 38.) The examiner who heard the evidence recommended denial of the application because, in his opinion, it was not necessary for respondent to issue debentures in order to afford its preferred stockholders some possibility of receiving an immediate income. He suggested that respondent's board of directors could, if it saw fit, devote part of the net income that would have to be paid out as interest on the proposed debentures to the payment of dividends on preferred stock. (R. 37–8.)

In December 1949, respondent's directors declared a small dividend of approximately $114,000. (R. 58, 70.) When this dividend was declared, the directors had before them the following facts:

1. Earnings for the year had been good, and amounted to $1,879,160. (R. 56.)*

2. The rehabilitation program had been carried forward in 1949 at an even higher rate than in the preceding year—$7,064,560 in 1949 as compared with $5,396,361 in 1948. (R. 57.)

3. Earnings for 1949 had been favorable, notwithstanding an increase in maintenance expense of $1,668,199 in 1949 over 1948. (R. 56–7.)

4. Substantially all of the diesel locomotives required for complete dieselization of the railroad had been deliv-

* If maintenance expense had been continued at the 1948 level, the 1949 earnings would have been $2,913,443. Maintenance expenses were $5,396,361 in 1948 and $7,064,560 in 1949. (R. 57) The difference between these two figures is $1,668,199, which, reduced by 38 percent to allow for income tax, amounts to $1,034,283. The addition of that figure to the 1949 earnings of $1,879,160 produces the sum of $2,913,443.

ered; the debt incurred for dieselization had been funded by equipment trusts made in May and July 1949; and no heavy down payments for new locomotives—which amounted to $4,167,687 in 1948 and 1949—would thereafter have to be made. (R. 57, 59, 61.)

5. The program of retiring bonded indebtedness had been completed during the preceding year. (R. 66.)

6. The company would not be faced with the necessity of meeting a $5,000,000 balance on an RFC loan in 1951. (R. 66.)

Another dividend, amounting to approximately $228,000, was declared in March 1950. (R. 70.) The financial data in the record ends with the close of the year 1949. (R. 56–8.)

In support of their motion for an impounding order, petitioners submitted affidavits by two of their attorneys and one of the petitioners in which opinions were expressed that the December 1949 and March 1950 dividends were declared largely because of the efforts of the petitioners in the prosecution of this suit. (R. 40, 46, 49.)

Two affidavits were submitted by respondent, one by its General Counsel, who was also a director, and the other by its Secretary. These affidavits, considered together, state that the affiants had attended the meetings of respondent's board of directors at which the dividends were declared, and had heard or participated in discussions relating to the payment of dividends prior to and after those meetings; that, in their opinion, both dividends were declared for economic and financial reasons having no connection with this lawsuit; and that, in their opinion, the directors had been influenced to declare the dividends by the fact that the dieselization program was almost completed, and by the further fact that no substantial down payments for diesel locomotives would thereafter have to be made. (R. 58–61.)

At the time of the hearing in the District Court, the only affirmative step which had been taken in this case by petitioners was the serving of some interrogatories. (R. 39.) Petitioners

were then contemplating the taking of depositions, but had not at that time taken a single deposition. (R. 39, 45.) The District Judge indicated that the amount to be impounded should be 20 percent of the March 1950 dividend and 20 percent of the December 1949 dividend; but he impounded 30 percent of the March dividend because the December dividend had been distributed. (R. 93–4.) The impounding order of March 30, 1950,* directed respondent to deposit with the clerk "30% of the amount of" the March dividend, and decreed that the "money so deposited *shall be considered* a fund" against which attorneys' fees and other expenses might be charged if the petitioners should finally prevail. (R. 120–1; emphasis supplied.)

There is no evidence to show that any substantial number of the 2800 preferred stockholders are in sympathy with this suit or that their interests are the same as those of petitioners. Solicitation by petitioners resulted in small contributions, aggregating less than $1,000, from approximately 100 shareholders. (R. 34, 50–1, 63.) There is nothing in the record to show that any of the other 2700 are in favor of the prosecution of this suit. One large stockholder was given leave to intervene, and counsel for this intervener appeared in opposition to the petitioners' motion for an impounding order. (R. 84–6, 109, 112.) After the appeal was taken, a committee of preferred stockholders was given leave to appear *amicus curiae* in the Court of Appeals in opposition to the impounding order. (R. 163–4, 178.)

Questions Presented

Petitioners' statement of the questions presented contains unwarranted assumptions, and is incomplete and not entirely accurate. A complete statement of the ultimate questions presented is as follows:

1. Whether there is any special reason for review by

* This order should not be confused with one entered on March 28, which was vacated on March 30. (R. 105–7, 121.)

this Court of a judgment of the Court of Appeals relating to an interlocutory order of the District Court?

2. Whether in a suit by a handful of stockholders, purportedly brought as a true class suit, to compel a declaration of dividends by the respondent corporation, the District Court had authority in law, in advance of trial on the merits, to seize part of a dividend declared by the corporation and impound it as special, earmarked security for any attorneys' fees and expenses which might be allowed to the plaintiffs in the uncertain event the District Court, upon the trial of the case, should render a final decree in their favor?

3. If there was authority in law for the entry of the impounding order, whether the entry thereof was an improvident exercise of discretion?

4. Whether the respondent corporation had an appealable interest in the impounding order?

ARGUMENT.

I.

There is no Special Reason for Review of a Judgment Relating to an Interlocutory Order of the District Court.

In *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 384, this Court said:

> "*** this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

The reversal by the Court of Appeals of the interlocutory order of the District Court will not in any way interfere with the further conduct of the case in the District Court. There is nothing in the opinion of the Court of Appeals, moreover, which would preclude petitioners, in the event they should establish the allegations of their complaint, from requesting, or the District Court from granting, out of dividends resulting from the final decree, an allowance to cover all expenses reasonably incurred, and all attorneys' services necessarily rendered, in the

prosecution of this suit. In the final paragraph of its opinion, the Court of Appeals took pains to make certain that its opinion should not be read as attempting to pass upon the relief which the District Court might grant after a hearing on the merits. (R. 166.)

The suggestion of petitioners (Petition 12) that if the impounded money is distributed to the preferred stockholders, petitioners will be without any practical remedy does not, even if it were true, present any "extraordinary inconvenience and embarrassment in the conduct of the cause." As is pointed out above, if the petitioners should prevail, they could be given any compensation to which they might be entitled out of dividends resulting from the final decree. Petitioners' argument, moreover, cannot be taken seriously; for they are endeavoring to sustain the impounding of a portion of the March 1950 dividend as security for services said to have resulted in the declaration of the previously distributed December 1949 dividend. (R. 93–4.)

II.

The Decision of the Court of Appeals is in Accord With Controlling Illinois Law, the Views of this Court, and the Prevailing View Throughout the Country.

The sole purpose of the interlocutory order entered by the District Court was to provide plaintiffs with security for expenses and attorneys' fees in the uncertain event they should prevail upon the merits. (R. 121.) The order was not entered by way of enforcement of any *prior* order or decree, but was entered *provisionally* as security for the enforcement of a final decree which the plaintiffs might never obtain. No finding was made that representation by the plaintiffs would fairly insure the adequate representation of all preferred stockholders.* *Cf. Pelalas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629, 632 (C. A. 7th).

* The District Court found that the action was "instituted for the benefit of the named plaintiffs herein and *is claimed to be* also for the benefit of all other 5% preferred stockholders similarly situated, ***." (R. 118; emphasis supplied.)

The power of the District Court to enter such an order is governed by Illinois law by reason of F.R.C.P. Rule 64, and also under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, which was extended to equity cases in *Guaranty Trust Co.* v. *York*, 326 U.S. 99. *Moore's Federal Practice*, Vol. 3, 1949 Supp., p. 345; *De Beers Mines* v. *United States*, 325 U.S. 212, 218; *Chappell & Co.* v. *Haddad*, 1 F.R.D. 221 (D. C. Mass.).

Under Illinois law, there is no such remedy as equitable attachment. As was said in *Dunham* v. *Kauffman*, 385 Ill. 79, 85:

> "In earlier cases in Illinois, it was held that there is no such thing as equitable attachment. (*Phelps* v. *Foster*, 18 Ill. 309; *Shufeldt* v. *Boehm*, 96 Ill. 560.) The late changes in the Attachment Act do not change that rule."

An order similar in purpose and effect to that before the Court of Appeals was reversed by the Illinois Appellate Court in *Lewis* v. *West Side Trust & Savings Bank*, 288 Ill. App. 271, which was a suit in equity by various creditors of a defunct bank to enforce an alleged liability of its stockholders. On motion of the complainants, the trial court had entered an order by which the receiver of the bank was directed to withhold payment of all dividends and other moneys owing to the stockholders by the bank, and to withhold delivery of any other assets of the stockholders in his possession. The purpose of the order, the Court said (p. 277), was "to retain the property of its stockholders in the possession of the bank or the receiver so that should a judgment be entered in this suit against a stockholder for his constitutional liability, complainants could satisfy the judgment out of the property so retained by the receiver." After reviewing earlier Illinois decisions holding that orders of like character or purpose were not authorized by any principle of equity jurisprudence, the Court, at page 278, declared:

> "***there is no such thing as equitable attachment in this State and the theory of taking away the control of a person's property by means of an injunction for the purpose of anticipating a judgment which may or may not

thereafter be obtained by a litigant is abhorrent to the principles of equitable jurisdiction."

A similar interlocutory injunction was condemned by this Court in *De Beers Mines* v. *United States*, 325 U.S. 212, which was a suit in equity by the Government against various foreign corporations and individuals for injunctive relief against an alleged conspiracy to restrain and monopolize certain commerce between the United States and foreign nations. On motion of the Government, the trial court had entered an order restraining the corporate defendants from withdrawing, selling or disposing of any of their property in the United States pending the issuance of a final decree and compliance therewith. The Government claimed the order was authorized by the Sherman Act, but this Court said (pp. 218–19) the jurisdiction given by that act "is to be exercised according to the general principles which govern the granting of equitable relief." This Court also pointed out (p. 219) that "the purpose and effect of the injunction is to provide security for performance of a future order which may be entered by the court." The issuance of the injunction, this Court stated (p. 219), presupposed or assumed, *inter alia*, that the Government might obtain a final decree.

In holding that the injunction was not authorized by the general principles of equity jurisprudence, this Court, at pages 222–3, declared:

> "To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction se-

> questrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence."

The prevailing view throughout the country is in accord with the foregoing decisions. 116 A.L.R. 270, 271. As this Court said in *De Beers Mines* v. *United States*, *supra*, at page 221:

> "Federal and State courts appear consistently to have refused relief of the nature here sought."

Since the interlocutory injunction which the Court of Appeals reversed was not issued to enforce any *prior* order or decree in favor of petitioners, but was entered *provisionally* to provide petitioners with security in the uncertain and remote event that a final decree providing for attorneys' fees and expenses should be rendered in their favor, the Court of Appeals correctly held that the interlocutory order was "premature and unsupported in law." (R. 166.)

III.

The Decision of the Court of Appeals Does Not Limit the Power of District Courts to Maintain the Status Quo in Class Actions.

Petitioners assert (Petition 7) that the decision of the Court of Appeals "sharply curtails or eliminates altogether the power of the district courts to grant interlocutory relief to maintain the status quo in class actions under Rule 23(a)." The argument advanced is based upon the unwarranted assumption that the District Court's impounding order merely preserved the status quo. The fact is that the order gave petitioners a new status.

Prior to the entry of the impounding order, petitioners had no special security for their remote and contingent claim for attorneys' fees and expenses; and their security—which was more than ample for the purpose—was the several million dollars in dividends which their complaint asked the District Court to order a solvent corporation to declare. (R. 17.) The order

seized and impounded, for the benefit of petitioners and their counsel, a portion of the March 1950 dividend as special, earmarked security for a potential money decree.

This is not a case involving a fund in the custody of the trial court. As the Court of Appeals held, there was no fund before the District Court other than the one brought into court by the impounding order. (R. 129–30, 166.) That order required respondent to deposit "30% of the amount of" the March 1950 dividend, and decreed that the "money so deposited *shall be considered* a fund" against which attorneys' fees and expenses might be charged. (R. 120–1; emphasis supplied.) At the hearing on their motion for an impounding order, counsel for petitioners conceded that "there is no fund at this time which is subject to the control and disposition of the court." (R. 99; see also R. 98.)

Since the District Court did not have custody or control of any fund, the case is one where petitioners were given by the impounding order a new status as specially secured potential creditors. As was held in *Warner Bros. Pictures* v. *Gittone*, 110 F. 2d 292, 293 (C.A. 3rd), the function of a preliminary injunction is merely to preserve the status quo, by preventing interference with rights previously enjoyed, and an injunction which gives the plaintiff a new status may be issued only after a final hearing.

A suit to compel a declaration of dividends is unlike the usual true class suit involving creditors, who are not owners, and whose interest ordinarily is in securing, as promptly as possible, all that can be realized on their claims. The interests of stockholders with respect to dividends are often conflicting. Some stockholders view their investment as would a creditor; whereas the interest of others is in the receipt of dividends only to the extent consistent with sound management of the company and the safety of their investment.* In *Giesecke* v. *Denver Tramway*

* A railroad corporation, it may be added, has obligations to the public which take precedence over dividends. *New York, Lake Erie, & Western R.R.* v. *Nickals*, 119 U.S. 296, 303–7; *Guttman* v. *Illinois Central R. Co.*, 91 F. Supp. 285, 297 (D.C.E.D.N.Y.).

Corp., 81 F. Supp. 957, 961 (D.C. Del.), it was held that a suit by a stockholder to compel a declaration of dividends is not a true class suit, but is one which the stockholder "could assert in his own right without joinder of any other member of his class," and that its purpose is "to establish a common fund in which each stockholder is to have separate and distinct interest."

A claim that the interests of stockholders not before the court are the same as those of the plaintiffs is not one to be established in cursory fashion. This is particularly true where the plaintiffs seek an interlocutory injunction which seriously affects the absent stockholders. F.R.P.C. Rule 42(b) provides that the district courts, "in furtherance of convenience or to avoid prejudice," may order a separate trial of any issue; and a hearing on the merits of a claim that representation by the plaintiffs "will fairly insure the adequate representation of all" can be had under that rule when necessary for any proper preliminary relief.

IV.

The Decision of the Court of Appeals is not in Conflict with Sprague *v.* Ticonic National Bank, 307 U.S. 161, or State Life Insurance Co. *v.* Board of Education, 401 Ill. 252.

It is argued by petitioners (Petition 13–15) that the decision of the Court of Appeals is contrary to *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, and *State Life Insurance Co.* v. *Board of Education*, 401 Ill. 252, where it was held that allowances of attorneys' fees are not confined to true class suits. This contention is without foundation.

In *Sprague* v. *Ticonic National Bank* and in *State Life Insurance Co.* v. *Board of Education*, the plaintiffs who sought allowances of attorneys' fees had obtained *final* judgments which benefited others. Petitioners have not cited, and cannot cite, any case upholding the seizure and impounding of money, as security for attorneys' fees and expenses, in anticipation of a final decree in favor of the plaintiffs.

The question whether the doctrine of *Sprague* v. *Ticonic*

National Bank applies to a suit brought by some stockholders to compel a declaration of dividends not deemed wise or prudent by other stockholders is one which was not before the Court of Appeals. That question is debatable; for it may well be argued that the plaintiffs in such a case, even if successful, should not be entitled to compensation from stockholders who did not favor dividends for services rendered in producing a result which they did not desire and which they may not regard as beneficial.

V.

The Question Whether This is a True Class Action is Primarily One of Fact.

Petitioners assert (Petition 15–17) that the question whether this is a true class action is purely one of law, which "the pleadings settle," and should not be confused with the question whether petitioners are qualified to act as representatives of the class. F.R.P.C. Rule 23 (a) requires a showing that representation by the plaintiffs "will fairly insure the adequate representation of all." Such a showing cannot rest on a general allegation in the complaint, particularly when, as is the case here, the allegation is denied in the answer. (R. 19, 22–3.)

In *Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662, it was held that evidence is essential to establish a true class suit. After pointing out that the complaining holders of certificates of beneficial interest had alleged the suit was "in their own behalf and in behalf of all others similarly situated," this Court observed at pages 671–2:

> "That allegation, of course, *would not by itself* determine the character of the proceeding (*Wabash Railroad* v. *Adelbert College*, 208 U.S. 58). For, in order that the decree should be binding upon those certificate-holders who were not actually parties to the proceeding, it had to appear that Dresser and the other complainants *had an interest that was, in fact, similar* to that of the other members of the class,***." (Emphasis supplied.)

The leading case is *Hansberry* v. *Lee*, 311 U.S. 32, which was

a suit brought by some of the parties to a restrictive covenant agreement covering a large area of land to enjoin alleged breaches; and it was there held that due process did not permit the plaintiffs to represent other landowners. At page 44 this Court said:

> "Those who sought to secure its [the agreement's] benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance, ***."

Further in its opinion, at pages 44 and 45, this Court declared:

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. [Citations.] It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far."

These observations are pertinent here because, from the very nature of the case, the interests of petitioners "are not necessarily or even probably the same" as the interests of the other preferred stockholders. If a suit to compel a declaration of dividends could ever be a true class suit, evidence is required to show that the stockholders not before the court desire the prosecution of the suit. For all the record before the District Court discloses, the great majority of the preferred stockholders may be in full accord with the judgment of respondent's directors that it was in the best interests of all stockholders,

preferred as well as common, to use earnings of the company to reduce its debt, rehabilitate its physical properties and dieselize its motive power.

VI.

The Impounding Order Which the Court of Appeals Reversed Was Improvidently Entered by the District Court.

In various portions of the petition it is suggested that there were some equities to support the drastic order of the District Court. We believe there can be no doubt, however, that even if there was authority in law for impounding, the order was improvidently entered.

As this Court has observed, "allowances [of attorneys' fees] are appropriate only in exceptional cases and for dominating reasons of justice." *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 167. It is a well known fact, moreover, that a suit to compel a declaration of dividends is seldom successful. The only affirmative step which had been taken by petitioners in the present case at the time their motion for impounding was heard was the serving of some interrogatories. (R. 39.)

The outstanding consideration militating against the impounding order is the fact that there was no necessity for it. As the Court of Appeals pointed out, petitioners made no claim that respondent was insolvent. (R. 166.) Thus, if petitioners should ultimately prevail, and the case is one in which an allowance of attorneys' fees and expenses might properly be given, the allowance could be made out of dividend moneys resulting from the final decree. Such a method of payment would insure that the fees and expenses were paid out of dividend moneys *actually* resulting from the prosecution of this suit, and would impose the burden of payment upon those persons who were preferred stockholders at the time of final decree and who received the dividend moneys resulting therefrom.

The impounding order subjected respondent to an unreasonable risk. Under the law of Illinois, the state where respondent was incorporated (R. 3), when the March 1950

dividend was declared, the relationship of debtor and creditor was created between respondent and each of its preferred stockholders, and the stockholders could recover the debt thus established in an action at law. *Cratty* v. *Peoria Law Library Ass'n*, 219 Ill. 516, 522; *Pease* v. *Chicago Crayon Co.*, 170 Ill. App. 234, 236; *Ford* v. *Ford Mfg. Co.*, 222 Ill. App. 76, 83. The impounding order thus exposed respondent to the risk of claims by preferred stockholders for the portion of their dividends which respondent was compelled to deposit with the clerk of the trial court. If this is not a true class suit, the impounding order would not be binding upon preferred stockholders who were not parties to this case, and hence might not be a defense to any such claims which they might assert.

The impounding order was also unreasonable because it established a dangerous precedent. In the passage of its opinion in *De Beers Mines* v. *United States*, 325 U.S. 212, 222–3, heretofore quoted (Point II, *supra*), this Court pointed out that "a precedent of sweeping effect" would be created if it were to sustain the preliminary injunction there before it, and that such a precedent would result in demands for similar injunctions in aid of potential final relief. These comments are pertinent here. If the impounding order here under consideration had not been reversed, the precedent established would have encouraged the institution of spurious suits against corporations which had not been able to pay dividends for some time, but which might reasonably be expected to resume payment within the course of a year or two, for the purpose of obtaining an allowance of attorneys' fees, for services not requested or desired, out of any dividends that might be declared during the pendency of the suits.

VII.

Respondent Had an Appealable Interest in the Impounding Order Entered by the District Court.

It is argued by petitioners (Petition 18–20) that respondent had no appealable interest in the impounding order. Pe-

titioners' motion to dismiss respondent's appeal was denied by the Court of Appeals on the same day its opinion was rendered, and respondent's right to appeal was not challenged by petitioners in their petition for rehearing. (R. 169–80.)

The appeal did not involve any controversy with respect to the distribution of the impounded dividend money. For this reason authorities, such as those cited by petitioners, relating to controversies among distributees over the division of a fund are not in point.

The impounding order was directed to respondent, and, in effect, restrained *it* from exercising its right to distribute the full amount of a lawfully declared dividend. (R. 120-1.) Respondent plainly had an appealable interest in the order.

Respondent also had an appealable interest in the order because it had both the right and the duty to protect the interests of its preferred stockholders who were not parties to the case. The decision of the Supreme Court of Illinois in *Republic Life Ins. Co.* v. *Swigert*, 135 Ill. 150, is directly pertinent. The proceeding was instituted by the state auditor against an insurance company to wind up its affairs. A receiver had been appointed, and the trial court had directed him to institute suits to collect unpaid stock subscriptions from all stockholders who were so indebted to the corporation. A writ of error was sued out by the corporation from a final decree subsequently entered, and error was assigned because of the entry of the order directing the receiver to institute suits against stockholders. In holding that the corporation could represent the interests of its stockholders by writ of error, the Court stated at pages 161–2:

> "***the stockholders of such corporation were not necessary parties to the proceeding. It would seem, then, that in any matter which affects the rights or interests of the stockholders, the company must, from the nature of the case, have the right to protect its stockholders, and that it is its duty so to do. A contrary conclusion would be subversive of justice, and in antagonism with first principles."

The Court of Appeals of Maryland in *United States Express Co.* v. *Hurlock*, 87 A. 834, held that a corporation had a duty to protect its stockholders against an unwarranted attachment of their stock. Acting under an order of the trial court, the sheriff had attached all the interest of a non-resident judgment debtor in the capital stock of a foreign corporation. The Maryland statutes, as construed by the Court of Appeals, did not authorize the seizure and sale of stock of a foreign corporation owned by a non-resident where the stock itself was not within the jurisdiction of the court. From a judgment of condemnation against the stock attached, the garnishee corporation appealed; and, in upholding its right to appeal, the Court said at page 837:

> "A motion has been made to dismiss the appeal upon the ground that the garnishee has no such interest as would authorize it to appeal. The corporation owes a duty of protection to its stockholders."
>
> * * * *
>
> "The appellant is a party to the case, is charged with the duty of protecting the interest of its shareholders, ***."

Respondent in the case at bar is representing the interests of substantially all of its preferred stockholders. The foregoing authorities plainly sustain its right and duty to represent their interests. If respondent could not have appealed, there was no party who could have protected the interests of the general body of preferred stockholders; for the intervening stockholder could not have appealed on behalf of anyone other than himself.

Respondent also had interests of its own which it was entitled to protect by an appeal. After the dividend was declared, respondent occupied a position akin to that of a garnishee, and was entitled to have its rights and obligations in the situation authoritatively determined.

In *United States Express Co.* v. *Hurlock*, 87 A. 834, above reviewed, the Court of Appeals of Maryland gave as an additional reason for entertaining the appeal the right of the corporation to protect its own interest. At page 837, the Court said

that the corporation "may be subjected to a suit for damages," and "should be permitted to have its rights and obligations with respect to the stock definitely determined by this court."

The Court of Civil Appeals of Texas in *Smith* v. *Security Investment Co.*, 16 S. W. 2d 926, upheld an appeal by a garnishee from a judgment entered in a garnishment proceeding to which the debtor had not been made a party. The answer of the garnishee admitted a stated amount of indebtedness to the debtor, but pleaded that this indebtedness was not the kind of an obligation which, under the law of the state, could be subjected to the plaintiffs' claim. At page 928 the Court said:

> "Authority is not wanting in support of the proposition that the duty of a garnishee to disclose in his answer facts within his knowledge, to show that the acknowledged debt is not subject to plaintiff's claim, may, in case of a disregard of such facts by the court, impose the further duty of taking an appeal."
>
> * * * *
>
> "*** the only right that garnishee had to prosecute this appeal was to secure immunity from a further claim against him by Sanders [debtor]."

Under the foregoing authorities, even if respondent had no duty to its stockholders, and its interest had been solely one similar to that of an ordinary garnishee, it nevertheless had the right to appeal for the purpose of protecting that interest.

CONCLUSION

For the reasons above stated, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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